



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KAKAMEGA

CIVIL DIVISION

MISCELLANEOUS CIVIL APPLICATION NUMBER 35 OF 2018

WEST KENYA COMPANY LIMITED.....APPLICANT

VERSUS

LUTHER ANGATIA.....RESPONDENT

CORAM: LADY JUSTICE RUTH N. SITATI

RULING

Background

1. The issue for determination that is before this court is contained in the undated Notice of Motion which was filed in court on 30th April, 2018. The certificate of urgency in support of the application is dated 27th April, 2018. By the application, the applicant seeks the following orders:-

a) Spent

b) That the Honourable Court be pleased to issue an order of stay of execution of the decree and judgment in Kakamega *CMC CC No. 202 of 2015(LUTHER ANGATIA MURUMBA – VERSUS – WEST KENYA SUGAR CO. LTD)* pending hearing and determination of this application.

c) That the honourable court be pleased to grant the applicant leave to file appeal out of time, from the decree and judgment in *KAKAMEGA CMC CC NO. 202 OF 2015 (LUTHER ANGATIA MURUMBA – VERSUS – WEST KENYA SUGAR CO. LIMITED)*

d) That costs of this application be in the cause.

2. The application is premised on twelve grounds set out on the face thereof and is also based on the supporting affidavit of MAUREEN ODEK dated 27th April, 2018. The gist of the grounds and the supporting affidavit is that the partial delay of barely three weeks is inadvertent and excusable; that the respondent will not suffer any prejudice if the application is allowed and finally that the intended appeal has high chances of success. The applicant also depones that he is ready and willing to abide by any and all conditions that may be imposed by this Honourable court both for the stay and the leave to file appeal out of time.

Response to the Application

3. The application is opposed vide the replying affidavit sworn by Luther

Angatia, the applicant herein. The applicant depones that the applicant's application is an afterthought since the same was filed only after attachment had taken place after due process. The respondent also depones that the applicant is not entitled to the orders sought because it has not come to court with clean hands for failure to disclose the fact that execution had already taken place by the time the present application was filed. The respondent also contends that the applicant cannot and should not expect to benefit from the discretion of this court as it has been indolent. Finally, the respondent states that the orders sought ought not to be granted since the applicant has not given any cogent reasons in respect of the same.

The Law

4. The relevant provisions of the law governing applications for stay of execution is **Order 42 Rule 6 of the Civil Procedure Rules (CPR)**. A court will exercise its discretion in favour of an applicant seeking stay of execution if the applicant demonstrates that –

- a) **he will suffer substantial loss if the order sought is not granted;**
- b) **the application has been made without undue delay.**
- c) **the applicant has provided or is willing to provide such security for the due performance of such decree or order as may ultimately be binding on him.**

5. It is to be noted that all the three conditions under **order 42 rule 6(2) of the CPR** are to be complied with if the stay order is to be granted.

Applicant's Submissions

6. The parties agreed to canvas the application by way of written submissions. Regarding the prayer for leave to file appeal out of time, counsel for the applicant urged this court to be guided by the provisions of **section 79(G) of the Civil Procedure Act (CPA)** to the effect that

“79(G) Every appeal from a subordinate court to the high court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order;

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

7. Counsel relied on a number of authorities in urging the court to find that the delay was neither inordinate nor intentional and that the reason for any delay was caused by the applicant's desire to satisfy itself as to the veracity of the grounds for the intended appeal so as not to waste the time of the court by filing a frivolous appeal. Counsel also urged the court to find that since blunders are likely to be made, such blunders should not be held against an innocent party. Finally, it was submitted that the intended appeal raises triable issues which ought to be determined on the merits; and that in any event, the respondent does not stand to suffer any prejudice as the fruits of the respondent's judgment will remain secure and unaltered during the pendency of the appeal. The applicant is willing to deposit the entire decretal sum in a joint interest earning account until the appeal is heard and determined.

Respondent's Submission.

8. In line with the replying affidavit the respondent submitted that contrary to the applicant's contention, application was truly an afterthought since the applicant was all along privy to all the information concerning the judgment and decree and the fact that the applicant was also sewed with the order for proclamation. The respondent faulted the applicant for failing to disclose the fact that execution had already taken place by the time the instant application was filed and that a motor vehicle seized pursuant to the proclamation was in the possession of auctioneers. The respondent further submitted that the applicant's contention that the respondent is a man of straw is not supported by facts. On the issue of security the respondent submitted that if the court is inclined to grant the orders sought, then it should order that half the decretal sum be paid to the respondent while the other half be deposited in a joint interest-earning account pending the outcome of the intended appeal.

9. It was also the submission of the respondent that the applicant has not given any good reasons why leave to appeal out of time should be granted; and particularly because, submitted the respondent, the applicant did not explain why there was a delay in filing the appeal. In this regard, reliance was placed on the case of **M/S Port Reitz Maternity versus James Karanja Kabia – Mombasa High Court Civil Appeal number 63 of 1997** in which the Court of Appeal held that the right of appeal must be balanced against the equally weighty right of the plaintiff to enjoy the fruits of the judgment delivered in his favour, and that there must exist a just cause for depriving the plaintiff of that right.

Analysis and Determination

10. From the record, judgment of the trial court was delivered on 20th March, 2018. The decree and certificate of costs were drawn and signed on 23rd March, 2018 and thereafter sewed upon the firm of advocates representing the applicant on 4th April, 2018. The applicant was served with the proclamation of attachment on 23rd April, 2018. Soon thereafter the instructed auctioneer seized a motor vehicle belonging to the applicant and was in possession of the same when the applicant moved to court for the stay order.

11. Having set out the above, I shall now deal with the prayer for leave to file appeal out of time. In the case of **Edward Njane Nganga & another v Damaris Wanjiku Kamau & another [2016] eKLR**, the court held, *inter alia*, that

“It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case of M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997 where the Court stated:

“That right of appeal must be balanced against an equally weighty right; that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right.”

A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercised. There have been numerous judicial pronouncements on this precise point. Aganyanya, JA in MONICA MALEL & ANOR V R, ELDORET CIVIL APPLICATION NO. NAI 246 OF 2008, stated:

“When a reason is proposed to show why there was a delay in filing an appeal it must be specific and not based on guess work as counsel for the applicants appears to show ... the applicants are not quite sure of why the delay in filing the notice of appeal within the prescribed period occurred, which amounts to saying that no valid reason has been offered for such delay.”

12. In the instant case, counsel for the applicant has gone round in circles in trying to explain to this court the reason for the delay in filing the Memorandum of Appeal, but on consideration of the same, this court finds and holds that there is no reason at all as to why both the Memorandum of Appeal and the Record of Appeal were not filed within time. The applicant contends that there was need to establish the veracity of the appeal before filing the same, but a scrutiny of the annexed draft Memorandum of Appeal does not show that the appeal has overwhelming chances of success as the real issue raised by the draft appeal is quantum of damages which is a matter of discretion by the trial court. Accordingly the prayer for leave to appeal out of time is dismissed.

13. I now turn to the application for stay of execution pending appeal. It has been stated elsewhere in this ruling that for an applicant to succeed on the prayer for stay of execution, all the three conditions under **Order 42 rule 6(2) of the CPR** must be fulfilled. The applicant correctly set out the principles to be considered by a court while considering an application for stay of execution pending appeal as set out in **Northwood Services Limited versus Mac and More Solution Limited [2015] eKLR**. The principles were set out as follows:-

a) The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.

b) The general principle in granting or requesting a stay is if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.

c) A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion a better remedy may become available for the applicant at the end of the proceedings.

d) The court in exercising its discretion whether to grant or refuse an application for stay will consider the several circumstances of the case and its unique requirements.

14. Applying the above principles, in addition to the provisions of **Order 42 Rule 6(2) of the CPR**, I find that the applicant has not made out a case for the stay order. In the first place the mischief which the applicant wanted to arrest had already taken place by the time the application was filed. The applicant was well aware that attachment had already taken place, but chose to remain silent about it. It is my considered view that the applicant’s silence was intended to mislead the court and accordingly, I find and hold that the applicant came to court with soiled hands by withholding pertinent information from the court. Further, the applicant has not produced for the courts scrutiny a certificate by the trial court as to time requisite for preparation and delivery to the applicant of a copy of the decree or order.

15. Secondly, the applicant has not demonstrated to the satisfaction of this court that it would suffer substantial loss if the order sought is not granted. The applicant merely mentioned that the respondent is a man of straw. The respondent has denied that he is a man of straw. It was thus incumbent upon the applicant to place evidence before this court to prove to the satisfaction of this court that the respondent is indeed a man of straw.

16. Accordingly having failed to demonstrate substantial loss, and in spite of the fact that the applicant has offered to give security, and in spite of there having been a delay of only seven days in filing the application, the application must fail, for proof of substantial loss is the cornerstone of any application for a stay order.

Conclusion

17. From all the foregoing, the applicant’s undated application which was filed in court on 30th April, 2017 is found to be lacking in merit and is accordingly dismissed with costs to the respondent.

It is so ordered

Ruling delivered, dated and signed in open court at Kakamega this 22nd day of June, 2018.

RUTH N. SITATI

JUDGE

In the Presence of

N/A for the applicant

Mr. Obilo for Shibanda for the respondent

Polycarp Mukabwa - Court Assistant